



PRELIMINARY STATEMENT – FRESH PRESIDENTIAL ELECTIONS

Dangerous political stand-off, uncontested election and assaults on institutions damage Kenya's democracy

Nairobi, 31 October 2017

This preliminary statement of the EU election observation mission (EOM) is delivered before the completion of the entire electoral process. Critical stages remain, including reaction to results and the adjudication of petitions. The EU EOM is now only in a position to comment on observation undertaken to date, and will later publish a final report, including full analysis and recommendations for electoral reform.¹

The EU EOM assessment at this stage is that actions by both sides of the political divide have been damaging to the electoral process and have put the people and institutions of Kenya in an extremely difficult position. These actions include intimidation of the judiciary, attacks on the Independent Electoral and Boundaries Commission (IEBC), introducing uncertainty in the legal framework with last-minute amendments to the electoral law without political consensus, obstruction of the electoral process, some disproportionate actions by the security forces, and shrinking space for civil society.

The weaknesses of the IEBC, including pronounced internal divisions, further contributed to uncertainty and agitation. Despite these problems, polling and counting appeared to be generally well administered and some technical improvements were evident in the results process (although further assessment is still needed). The opposition National Super Alliance (NASA), headed by Raila Odinga, boycotted the election. This resulted in a turnout of approximately half that of the August elections, NASA supporters blocking the electoral process in some counties and attacks on electoral staff and citizen observers. The IEBC declared the incumbent President Kenyatta of the Jubilee Party as the winner of the election with 98.27% of the votes.

Such a divisive electoral process, with accompanying violence, has been detrimental to Kenya's democratic functioning and the rule of law, as well as its prosperity. There is an urgent need for dialogue between the two sides, for institutions to be given the space and security to work with full independence, and for grievances to be addressed through democratic and judicial channels. More than ever there is an onus on political leaders to find a way out of the current impasse, so that Kenya's progressive Constitution can be honoured, and citizens' rights to electoral participation and personal security can be upheld.

The EU EOM undertakes a comprehensive approach to election observation,² however for the fresh presidential election the mission was compelled to have limited field coverage for security, methodological and political reasons. The EU EOM was deployed on 13 June under the leadership of Chief Observer, Marietje Schaake, Member of the European Parliament. For the fresh presidential elections, the EU EOM consisted of 8 core team experts and 24 long-term observers (LTOs) deployed across the country. On election day the mission was composed of 57 observers from 23 EU Member States, Norway and Switzerland. Canada has also supported the EU EOM. The EU EOM has coordinated with other long-term election observation missions including the African Union.

¹ The EU EOM may also make additional statements on election-related matters as and when it considers it appropriate.

² See https://eeas.europa.eu/topics/election-observation-missions-eueoms/421/election-observation-missions-eueoms_en. This is in full accordance with [the Declaration of Principles for International Election Observation signed at the United Nations](#) in October 2005.

1. Electoral dispute resolution

Extensive adjudication on electoral matters has been required by the judiciary, who have had to endure verbal attacks and intimidation

NASA challenged the 8 August presidential poll, stating that the election was not transparent, verifiable and accountable as is legally required,³ and a fresh election was ordered by the Supreme Court to be held within the constitutionally-stipulated 60-day limit.⁴ The 1 September decision demonstrated the ability of the judiciary to rule independently of government and was a landmark ruling in focusing not on the outcome of the election but on the constitutional requirements of the process itself.⁵ The strong emphasis on transparency and verifiability, not just for candidates but also for citizens, may ultimately raise integrity and standards as well as confidence in future electoral processes. However it resulted in immediate implementation challenges. The ruling found systemic institutional problems but no individual criminal intent or culpability.⁶

On 10 October, the NASA presidential candidate wrote to the IEBC informing it of his withdrawal, arguing that on the basis of a 2013 Supreme Court decision on a presidential petition, the fresh election should be cancelled and a new nominations period called. However the election laws are silent on the process of the withdrawal of a presidential candidate in a fresh election, and the IEBC kept the NASA candidate on the ballot.⁷ The matter remained legally and politically contentious, with NASA seeking a fresh nomination period and delayed elections (to be held after 90 days).

The following day the High Court ruled against an IEBC decision that only NASA and Jubilee Party candidates were to be on the ballot, stating that previous presidential challenger Dr Aukot should also be able to run.⁸ This finally resulted in an IEBC gazette notification of all the original eight candidates (the six other candidates received a combined total of less than 0.89% of the votes in August). The case had originally been lodged on 6 September with the Supreme Court.⁹ It was then referred to the High Court, which made its ruling on 11 October. This left the IEBC with 15 days to prepare a different design of ballots and results forms (with more candidates) and also impacted on the results management process with the Kenya Integrated Elections Management Systems (KIEMS).¹⁰

Controversially, on the day before the election, the High Court ruled that the IEBC had not undertaken the necessary consultation before publishing the gazette notification of returning officers. However, the ruling stipulated that as the petition had not asked for the election to be stopped, and in view of the public interest,

³ The decision of the seven-judge bench of the Supreme Court was taken by four judges, with two dissenting opinions and one judge taken ill. All related documents are available at <http://www.judiciary.go.ke/portal/page/election-petitions>

⁴ No party to the petition requested a recount. Furthermore, the 14-day time limit for judicial adjudication *de facto* prevents the court from such a measure.

⁵ The court's ruling is unprecedented in Africa. Globally there are few examples of a High Court nullifying a presidential election (in Ukraine in 2004, the Maldives in 2014 and Austria in 2016).

⁶ The IEBC's lack of compliance with court orders for access to its servers and insufficient explanation for shortcomings in transparency contributed to a historic annulment of the presidential election on 1 September.

⁷ Section 52 (1). Election (General) Regulation 2012 states that a candidate who has been nominated may withdraw his/her candidature by submitting a form 24A within three days of nomination. No such form was submitted by the NASA candidates. Furthermore, the ruling in the Aukot petition established that parts of the 2013 judgment are *obiter dicta* and therefore are not binding.

⁸ Dr Aukot was an interested party in the presidential petition of 2017.

⁹ The Supreme Court dismissed the application, referring to a lack of jurisdiction as the case concerned interpretation of the Constitution which in the first instance is the preserve of the High Court.

¹⁰ The keyed-in results data could not be used as according to the contracted service provider (OT Morpho) there was not time to alter transmission programmes on the KIEMS.

the Court would not cancel the notification. Although the court did not decide against the IEBC, the Commission filed an appeal on the same day at 16.30. Unusually, at 21.30 the Court of Appeal gave a stay order temporarily overturning the earlier High Court decision, thus provisionally affirming the legality of the returning officers.¹¹ Further judicial deliberation on the legality of the appointment of the returning officers is expected.

The judiciary has endured many instances of intimidation. Threatening crowds of demonstrators have been seen outside the Supreme Court. Leaders of the ruling Jubilee Party have continued to strongly criticise the judiciary using derogatory language, including senior Jubilee officials warning the Supreme Court and questioning its independence, alleging its “*infiltration by NASA*”. The day after the Supreme Court’s decision, President Kenyatta said of the judiciary “*there is a problem and we must fix it.*”¹²

On 19 September, the Chief Justice, as Judicial Service Commission (JSC) Chairperson, issued a statement on the aggressive attacks against the judiciary, referring to demonstrations bordering on violence, an intention to intimidate, and senior political leaders threatening to cut the judiciary down to size. He also referred to insufficient security protection for judicial officers. There is a strong concern among a variety of stakeholders about political reprisals by the executive against the judiciary, including cuts to budget and staff.

The day before the election, the Supreme Court did not have the necessary quorum to hear a petition for a delay to the poll. This is highly unusual for a Supreme Court hearing and has raised serious questions among Kenyan stakeholders, including about possible political interference preventing judges from attending the hearing. The previous day the driver of the Deputy Chief Justice was shot.¹³ Not hearing this case *de facto* cut off the legal path for remedy before the election.

2. The legal framework

Against international good practice, changes in the legal framework for elections were introduced during the process without political consensus or clarity on their application

The ruling party advanced controversial changes to the electoral laws through parliament, contrary to good practice for elections, which effectively would have changed the rules of the game half-way through without consensus.¹⁴ Their introduction to parliament was antagonistic, brought uncertainty and further divided the two camps. The bill was in part used as a justification for non-participation by NASA in the electoral process (who also referred to the IEBC’s lack of reform). None of the proposed changes were critical for Kenya to comply with international commitments nor were pre-requisites for improvements to the fresh election entailed in the Supreme Court’s ruling.

The bill went to the President for assent on 13 October, and following the lapse of 14 days, automatically passed for gazette notification, which has to take place within seven days (i.e. by 3 November).¹⁵ Uncertainty

¹¹ The Court of Appeal did not appear to focus on the merits of the High Court decision, rather it noted that no court can change the election date because the timeframe for fresh elections is set by the Constitution and cannot be changed.

¹² President Kenyatta, in Kiswahili and English, 2 September 2017, in a State House address to governors, senators, members of National Assembly and members of county assemblies elected on a Jubilee Party ticket.

¹³ This was given as a reason for the Deputy Chief Justice’s non-participation. Another judge was taken ill, and other judges were away without a clear explanation, leaving only two judges available to hear the case.

¹⁴ For further information see Statement EU EOM Kenya 2017 from 3 October. *The EU Election Observation Mission calls on Kenya’s political leaders to demonstrate commitment to democratic electoral competition and institutions.* https://eeas.europa.eu/headquarters/headquarters-homepage/33172/eu-eom-statement-3-october_en

¹⁵ See articles 115(6) and 116(1) of the Constitution. Section one of the Election Act (Amendment) Bill, 2017 states that “*This Act... shall come into force upon publication in the gazette*”. However some lawyers from the parliament

over the exact timing of notification, and whether it would be applicable to the on-going election, exacerbated uncertainty and the likelihood of further legal challenges.

The legal amendments attempted to address *inter alia* the legal lacuna in the case of the IEBC Chairperson resigning. However changes to the composition and functioning of the IEBC (without political consensus) are not appropriate mid-way through an electoral operation. The reduced requirements for a quorum for the commission's meetings also risk inconsistent decision-making. The amendments raise the threshold for annulment of an election by requiring that both the process *and* the outcome be affected by the illegalities or irregularities. They give unwarranted discretion to IEBC staff in deciding whether electronic or manual forms prevail as the basis for tabulation (going against the recommendations of the Kriegler report).¹⁶ Other amendments weaken safeguards without qualification, for example in stating that failure to electronically transmit or publish results would not be a basis for invalidation (which allows for normal operational shortcomings but undermines crucial transparency measures).

3. The political environment

The campaign period was characterised by uncertainty, extreme brinkmanship, attacks on institutions, and protests that included violence

Political polarisation became more extreme before the election with increased election-related violence. The rejection by both the NASA and Jubilee leaderships of dialogue resulted in a stand-off, with the IEBC caught in between.¹⁷ There have been mutual accusations of election sabotage and increasing attacks on institutions from both sides.¹⁸ This created an atmosphere of public mistrust and questioning of the credibility of the election, as well as national uncertainty with consequent effects on the economy.

After 26 September, NASA held regular demonstrations with the slogan “*no reforms, no elections*” and increasingly criticised state actions as repressive.¹⁹ Demonstrations were mostly in the NASA strongholds of Nairobi and Nyanza, where there were violent conflicts between the police and protesters as well as criminal elements. Reports on the possible incorporation of militia groups in security agencies and/or protester groups furthered concerns about the escalation of violence, with an increasing ethnic dimension and brutality in the election process.²⁰ On 12 October, the Acting Interior Cabinet Secretary Matiang’i ordered a ban on protests in the Central Business Districts of Nairobi, Kisumu and Mombasa, which was temporarily suspended by the High Court five days later.

confirmed to the EU EOM referred to the amendments being immediately applicable prior to gazette notification by the Attorney General. This is also consistent with reports of statements by the majority leader in the National Assembly.

¹⁶ The Kriegler and Waki Reports, 2009, undertaken after the 2007/8 post-electoral crisis.

¹⁷ Speaking at a rally in Trans Nziya county on 18 October, President Kenyatta stated “*There will be no sitting in boardrooms to negotiate and share government. It is Kenyans who have the right to decide who will be president.*” Addressing the media on 17 October, Odinga emphasised that he would participate only in talks about elections and not talks about coalition government. “*I am not interested in Nusu Mkatu, I am interested only in a dialogue on fresh and fair elections.*”

¹⁸ After the annulment of the presidential election by the Supreme Court on 1 September, President Kenyatta called for calm but referred to the four Supreme Court judges as “*crooks*” and “*thugs.*” At a press conference on 21 September, President Kenyatta called the court’s judgment a “*monstrous injustice*”, which “*robbed Kenyans of their democratic right that they exercised on August 8.*” On 10 October, Raila Odinga explained his withdrawal by referring to the “*criminal enterprise that perpetrated the fraud in the August election [which] is firmly in charge of the Commission.*”

¹⁹ Demonstrations were initially held weekly and then became daily, with some exceptions.

²⁰ NASA claimed the outlawed Mungiki group has been revived in Jubilee strongholds to disturb peaceful NASA demonstrations, create chaos, and in this way justify excessive use of force by the police.

There has been public criticism of the security agencies for excessive use of force during the demonstrations resulting in deaths and injuries, as well as during the earlier post-election August protests.²¹ The Inspector General of Police (IGP) only first issued a press statement on police actions on 13 October.²² The lack of public information on security force deployment, as well as timely and independent investigation of killings, diffused accountability, eroded responsibility and reduced transparency. Police have confirmed that four people were killed in the pre-election demonstrations, although NASA and CSOs make reference to higher numbers. Sexual violence was also reported.²³

Jubilee conducted large-scale campaign events, including in major NASA strongholds and attracted some public defections of prominent opposition leaders.²⁴ Jubilee benefited from the advantages of incumbency, for example issuing land titles to public schools and a mosque in Mombasa on 8 October and using a national event, Mashujaa Day (20 October), for campaign purposes.²⁵ It also used county and national government vehicles for campaign events.²⁶ NASA exercised its right to boycott, and mobilised supporters accordingly.

On the eve of the election, NASA declared its transformation into a “*resistance movement*”, with a “*national campaign of defiance of illegitimate governmental authority and non-cooperation*” and economic boycotts. The NASA presidential candidate, Raila Odinga, also referred to staying at home during election day and mobilising for fresh elections to be held later (within 90 days).

Extreme and provocative discourse became increasingly common. For example on 14 October, NASA released a press statement entitled “*CS Matiang’i and IG Boinnet committing genocide.*” On 21 October, the government spokesperson released a statement alleging an “*elaborate conspiracy by sections of NASA and a web of renegade foreigners to subvert the Constitution and the rule of law by sabotaging democratic presidential elections*”. The cited reason was to create opportunities for “*corruption, drug trafficking and other practices which will eventually kill this country’s development and progress and make it an international pariah.*”²⁷

²¹ Human rights organisations estimated a higher number of casualties resulting from a disproportionate police response to the protests, referring to the documented, but not officially acknowledged and investigated killings in the aftermath of the 8 August elections. In a report released on 16 October, Human Rights Watch (HRW) and Amnesty International (AI) released the details of 33 deaths documented in Nairobi between 9 August and 12 September, alleging that the “*national death toll could be as high as 67.*” These figures are compatible with the findings of the Kenya National Commission on Human Rights (KNCHR), an authorized government body, which cited 37 deaths nationwide in the period from 9 to 12 August.

²² The police have not so far given full information on the circumstances of the deaths. Some media and CSO reports have attributed the killings to police using live fire. The 13 October police report was later revised in a press statement on 20 October, which reported four deaths from police fire during the protests between 2 and 16 October.

²³ Twenty CSOs, professional associations and independent state organizations wrote an [open letter](#) to the Inspector General of Police, the Acting Cabinet Secretary for Interior and the Cabinet Secretary for Health citing at least 60 cases of sexual violence reportedly mainly committed by police officers.

²⁴ For example, the former Bomet governor Isaak Ruto (CCM), former senator Hassan Omar (Wiper) and most recently the governor of Taita Taveta, Granton Samboja.

²⁵ At the official public ceremony of Mashujaa Day, President Kenyatta addressed the nation, asking for support on 26 October “*As a candidate, I humbly appeal to all Kenyans to vote me back to office for another term of five years (...)* With your continued support, we can collectively achieve more and better results in the second term.”

²⁶ EU EOM LTOs reported the use of county government vehicles being branded in Jubilee logo and colours, for example in Kiambu and Muranga counties.

²⁷ Another example is from 17 October, when Acting Interior Cabinet Secretary Matiang’i was recorded telling Gusii people in South Mugirango (Kisii county) that “*Any person planning to stop people from voting here, remember I am in charge of security. I will order the police officers to look the other way so that you can slap him.*” There was no evident official response to this.

There has been an increase in cases of hate speech exacerbating ethnic tensions.²⁸ EU EOM LTOs have seen leaflets with incitement messages in several counties.²⁹ At the end of September, the National Cohesion and Integration Commission (NCIC) reported that more than 300 cases of hate speech are under investigation.³⁰

4. The election administration

IEBC technical preparations were undermined by leadership problems and attacks on the institution, including protests and obstruction of preparations

The Commission operated under increasingly difficult conditions, with protests from NASA outside IEBC offices, having to wait 20 days for the Supreme Court detailed judgment on the presidential petition, various court cases adjudicated close to election day, and an uncertain legislative framework.³¹ The IEBC did not manage to hold effective consultation with the parties to assist with the challenges it was confronted with. Initially the IEBC failed to refer to parties over the choice of date for polling, and then the Chairperson only managed to bring party leaders together once (despite attempts to hold joint candidate meetings). The Commission maintained an open-door policy with parties and candidates, held bilateral meetings, and undertook stakeholder forums.³²

The IEBC's internal struggles over the fresh presidential election were very apparent, exacerbating weak public confidence in the institution. On 18 October, one of the commissioners resigned citing security concerns, commissioners prioritising party interests over merit, and the absence of a suitable political environment for credible elections. The IEBC Chairperson then gave a statement confirming "*full technical preparedness*" but saying that political dialogue and agreement, as well as changes in staff, were needed for him to commit to serving as the National Returning Officer and for a "*free, fair and credible election*".

NASA brought out 9 demands for the fresh election, known as "*irreducible minimums*" (which contained 45 interrelated sub-points).³³ Positively, on 10 October, the IEBC published a detailed response, showing an effort to fulfil NASA's demands. Following the 18 October call by the Chairperson for staff whose impartiality had been questioned to step aside, the CEO publicly committed to taking three weeks' leave (beginning three days before polling).³⁴ Other "*minimums*" were not realistic within the constitutional 60-day time limit, and were

²⁸ On 5 September, Moses Kuria, Jubilee MP, was filmed at a rally in Kiambu referring to the opposition as "*demons*" and calling for a manhunt for those voting for NASA. On 10 September, former NASA Senator Johnson Muthama was arrested and charged with incitement to violence for calling President Kenyatta and his Deputy to a duel at a rally. On 25 September, the Jubilee Party chairman in Nakuru, David Manyara, was taken into custody and charged with incitement to ethnic violence. At a public rally in Nakuru on 19 September, Manyara reportedly addressed the public, saying "*Let Raila be warned that we are ready for a war (...) from today the real Kenyans are going to rise up.*" The same day, NASA Embakasi East MP, Paul Ongili, was charged with creating disaffection against the presidency at a campaign event.

²⁹ For example, in Thika constituency, Kiambu county, EU EOM LTOs have seen leaflets stating "*Enough is enough!!! Every Luo community should leave Central Province within 48 hours.*" LTOs have seen similar leaflets in Nakuru Town.

³⁰ For example, reports say the NCIC is currently dealing with a case against Moses Kuria (Jubilee MP) for asking the IGP on 25 September to shoot the opposition leader. Also, NASA MP Gladys Wanga is alleged to have said on the same date that President Kenyatta and his deputy William Ruto spread cholera.

³¹ For example, the legal amendments introduced mandatory requirement for the IEBC to "*live stream*" results.

³² A consultative meeting between representatives of presidential candidates and the IEBC held on 27 September was adjourned due to NASA's objection to Jubilee's proposed electoral law amendments, and never reconvened.

³³ Some of NASA's irreducible minimums were consistent with recommendations made by the EU EOM. See EU EOM [Interim Statement, 14 September 2017 "Recommendations for the Re-Run Based on Findings Since the 8 August Election Day"](#).

³⁴ Reportedly other staff also took leave, but no public commitment was made. Earlier, in a leaked memo, the Chairperson had challenged the CEO over shortcomings in the 8 August election. This was followed by other

not so obviously related to the specific shortcomings identified by the Supreme Court in its detailed judgment.³⁵ Regrettably, the IEBC did not offer NASA or other stakeholders access to the 8 August ICT systems and server in the run-up to the fresh election.

The IEBC undertook a review of the annulled election, and improved training materials and arrangements, and also gazetted results paths and complementary mechanisms. Although the IEBC increased public communication somewhat, this lacked structure and was late in the process. However the Commission did not undertake field-testing of procedures and technology. Institutional ownership of ICT remained limited, for example, the cloud server continued to be run through an external service provider.³⁶ Implementation challenges were also complicated by dependence on contracted service providers, for example in managing alterations needed after additional candidates were allowed to run (following the ruling on Dr Aukot's participation).³⁷

Following NASA's decision to withdraw its candidates, there were cases of violent disruption of training in some areas,³⁸ resulting in some of the selected polling staff not attending, as reported by EU EOM LTOs. Disruptions included attacks on vehicles and training locations. Reportedly 1,000 polling stations were affected, with some staff later trained in a different location. Some disruptions to the distribution of the KIEMS kits and other materials due to insecurity were also reported. These security challenges put the IEBC and its staff in an unfair position.

5. Polling and counting

Polling appeared to be well conducted, but lacked competing agents to check the process, and was violently disrupted in some areas

NASA conducted a boycott that had an obvious impact on turnout with reduced or minimal participation in many parts of the country. Merely going to the polls became a political statement, and there were reports of intimidating checks in different areas, by supporters of both camps, looking at whether people had ink on their fingers from voting.

In Nyanza, there were severe obstructions resulting in the IEBC declaring towards the end of election day the postponement of polling by two days in four counties: Homa Bay, Kisumu, Migori and Siaya (covering 9.6% of the electorate).³⁹ The next day this was "*rescheduled until further notice*",⁴⁰ with the Chairperson referring

commissioners issuing a dissenting press statement. The Chairperson announced the establishment of a project team to oversee the fresh election, which was initially controversial as it was perceived as a unilateral initiative.

³⁵ Those not implemented by the IEBC included changing contracted service providers, appointing new constituency returning officers, providing system security information, and barring 2 commissioners and 10 staff members from having a role in the fresh election.

³⁶ The IEBC undertook an external certification of the KIEMS system, mainly aimed at assessing security issues. The certification report was not made public prior to the election.

³⁷ Time constraints meant that the KIEMS devices could not be reconfigured and therefore the keyed-in results data could not be employed (meaning only scanned polling station results forms could be sent).

³⁸ Training of polling staff was interrupted or held with fewer participants, and in some cases serious threats, stoning of venues or violence were reported in Western Kenya. EU EOM LTOs observed or received consistent reports of disruptions of trainings in Migori and Homa Bay counties and in at least one constituency of Busia county. LTOs also referred to attacks in Siaya and Kisumu, with trainings canceled in all Siaya constituencies and the possible kidnapping of IEBC staff.

³⁹ Referring to section 55B of the Elections Act and regulation 64A of the general regulations.

⁴⁰ [*Chairman's Address on the Status of Fresh Presidential Election*](#), 27 October 2017, referring to 27 constituencies in the 4 counties. Later on 28 October the Chairperson referred to the vote being postponed in 25 of the 29 constituencies in the 4 counties. In total there are 47 counties and 290 constituencies (plus one for the diaspora).

to staff being ambushed and tortured, having their homes broken into, and being violently prevented from entering their assigned polling station. The Chairperson also noted “*In some instances even when the police got reinforcement to secure the IEBC staff it did not prevent the violence*”, EU EOM LTOs also received reports of staff being threatened, blockades of offices, officials fleeing, stoning, and attacks on security personnel. In addition to street actions there was strong resistance to polling from community leaders, for example Nyanza Anglican clergy noting regional profiling, police brutality, risk of a “*state massacre*”, and that there could come a time for “*self-defence*” measures.⁴¹ Governors also rejected polling taking place in their counties.⁴²

There were disruptions and security problems in other parts of the country, involving for example road blocks, barricades and walls being broken. Some citizen observers were intimidated and attacked.⁴³ Official sources confirmed that four people were killed by the police on election day, although national and international media cite more.⁴⁴ However elsewhere polling proceeded smoothly.

EU EOM observers were limited both numerically (to 50) and geographically (for security reasons), and therefore the mission does *not* have a representative sample. From what was seen, polling was well conducted, being positively assessed in all 105 polling stations visited. Voting procedures were generally well implemented and some improvements from August were identified, including the marking off of each voter on a voter list, and a more elaborate complementary mechanism for cases when voters could not be biometrically identified in the KIEMS kits.⁴⁵ However in approximately a quarter of observed stations, voters’ fingers were not consistently checked for traces of ink. In the 16 observations of closing and counting, procedures were also generally well conducted, although ballot reconciliation measures were not always completely followed.

The lack of agents from competing parties leaves the process vulnerable to abuse, despite a range of safeguards included in the procedures for polling and counting.⁴⁶ Potential abuse could for example include changes to numbers on forms or improper use of the (paper-based) complementary mechanism used in case of non-recognition on the KIEMS device. Information has not to date been made available by the IEBC on the number of people who voted in each location with the KIEMS and the number who voted through the complementary paper-based mechanism.⁴⁷

⁴¹ Press conference, 27 October 2017.

⁴² For example, Kisumu Governor, Senator and Women Representative, Nyando MP (Kisumu) and Suna East MP (Migori).

⁴³ The Elections Observation Group (ELOG) reports that on election day one observer was attacked by armed protesters (Ruaraka constituency) and another was harassed and beaten (Nyali), Statement 27 October. Kura Yangu Sauti Yangu reported that as of 14.00 on election day 6% of their observers had been obstructed or attacked.

⁴⁴ Press statement of the Office of the Inspector General National Police Service, 27 October 2017.

⁴⁵ In cases where a voter is not recognized biometrically in the KIEMS, but only by his/her alphanumeric data (name/ID number) on the KIEMS, the voter is required to be validated in the system by the presiding officer and a form filled in. Voters who were only manually identified (i.e. not in the KIEMS), have to complete a separate form and require approval of the returning officer. This is in case of KIEMS failure.

⁴⁶ EU EOM observers saw Jubilee agents present in 101 polling stations out of 105 visited. NASA were only present in one, and agents representing other candidates were only seen in two polling stations. Jubilee agents were present in all tallying centres observed. Of the 34A forms examined to date by the EU EOM, 94.8% were signed by Jubilee agent, 0.14% by NASA agents and 0.58% by other agents..

⁴⁷ On 29 October, the Chairperson gave the total number of voters authenticated using the KIEMS kits. However communicating a breakdown by polling station would be a stronger transparency measure.

6. The results process

Improved transparency and verification was carried out, in line with EU EOM recommendations, revealing some cases of results inconsistencies

The IEBC improved the standardization of results forms and enhanced transparency through the projection of tallying at constituency centres for agents and observers to see the tabulation process.⁴⁸ In 17 out of 19 constituencies observed by the EU EOM the tallying process was positively assessed as being orderly and transparent. However, in two constituencies projectors were not working (thereby reducing transparency), and in only about half of the centres observed were paper copies of polling station results forms (34As) compared against the corresponding electronically transmitted 34As. In a third of constituencies observed, completed results forms were not posted outside the centres for public scrutiny. Jubilee MP, Alice Wahome, has been filmed physically harassing an IEBC returning officer in Kandara (Muranga county), prompting the IEBC to immediately publicly note that such harassment “*is an electoral offence that must be punished.*”⁴⁹

There was a significant improvement in the electronic transmission and on-line publication of results forms since August through better use of mobile network providers and modified software. On election day, nearly all polling stations that opened reportedly submitted results data through the KIEMS devices, with 34A scans then made immediately available online.⁵⁰ Before the declaration of results on 30 October, 37,187 results forms were reportedly available on the IEBC public portal, i.e. covering virtually all polling stations where polling took place.⁵¹ Similarly for all the 266 constituency results forms (34Bs). This is a significant improvement from August.⁵²

The EU EOM has undertaken an initial examination of a random sample of 1,550 polling station results forms (34As) and found forms to be available, with only 2% not being fully readable due to poor scan quality,⁵³ a marked improvement from August.⁵⁴ The EU EOM looked at a sub-sample of 300 polling stations and found that 48 and 72 hours after the close of polling, the 34A forms available on the IEBC portal were still identical to those uploaded on election night. Over the same period, several 34Bs with missing results pages were replaced with their full versions, with all available data matching. Of the sampled 34A forms examined, only one form was not signed by a presiding officer, 2.6% were not stamped, and 1.1% had some data missing (usually concerning the number of registered voters and/or rejected or disputed ballots). This is an improvement from the August election.⁵⁵

The EU EOM has also undertaken an initial analysis of the mathematical accuracy of results forms. Of the sampled 34A forms, 0.9% have been found to contain arithmetical errors and 1.8% showed some signs of altered figures. Again, this is less than in the August election.⁵⁶ Noteworthy are the results in Garissa Township constituency, which show some unusually high turnouts in some polling stations, i.e. turnouts that are very different to other polling stations in the same centre/area, with extra digits seemingly added to President

⁴⁸ This is in line with the EU EOM recommendations from 14 September.

⁴⁹ IEBC Statement on Intimidation of Election Officials, 28 October 2017.

⁵⁰ The IEBC reported that on election day approximately 87% of all polling stations in the country (including those that didn't open) submitted results data through the KIEMS rising to 91% by the end of the following day.

⁵¹ <https://forms.iebc.or.ke/>.

⁵² In August, only 30,000 polling station result forms were transmitted on election night (some 73%), and even after the deadline for submitting petitions, 7% of polling station results forms sampled by the EU EOM were not available.

⁵³ In total 89.5% of the sample were online within 24 hours of the close of polling.

⁵⁴ In the August election, 18% of the 1,558 34A forms examined by the EU EOM were only partially readable and 5% were not readable at all.

⁵⁵ In the August election, of the 1,558 34A forms examined by the EU EOM, 1% were not signed by the presiding officer and 3% had missing data.

⁵⁶ In the August election, of the 1,558 34A forms randomly examined by the EU EOM, 2.3% had mathematical anomalies and 3% had altered figures of some sort.

Kenyatta's total.⁵⁷ The lack of agents from competing parties in polling stations and tallying centres increases the risk of such possible errors and of manipulations taking place. Mostly, such figures were collated into constituency tally forms as received (as is required). In a few isolated cases, modifications occurred in the completion of the 34B form.⁵⁸ Otherwise, of the 500 34As examined so far,⁵⁹ the numbers on 34A forms appear to be accurately transposed onto 34B forms. However the EU EOM noted some inconsistency in how votes that had apparently mistakenly been allocated to minor candidates on 34As were dealt with on 34Bs.⁶⁰

The IEBC had sought judicial clarification in regards to verification of results forms at the National Tallying Centre. On 17 October, the Supreme Court emphasized that it is the duty of the IEBC Chairperson to bring to the attention of the public any inaccuracies discovered in the verification of results forms from polling stations (34As) and constituency tallying centres (34Bs). The 34Bs would then be used as the basis for tabulation of the national 34C form. The Chairperson is also obliged to state whether any discrepancies affect the overall results outcome (with correction only possible through a judicial petition).⁶¹ The IEBC undertook multiple checks of forms at the National Tallying Centre, and also facilitated agents' active participation in the verification exercise. In the results declaration on 30 October, the IEBC identified inconsistencies/variance between 34As and 34Bs amounting to 273 votes only, with no further information given.

Positively, the Commission granted agents read-only access to the KIEMS back-end on election day and until the declaration of results, thus introducing an important transparency measure. Upon formal request, observers were also granted access to the ICT room at the National Tallying Centre, with read-only access.

Controversy arose over the turnout on election day with the IEBC initially giving inconsistent information without explanation. On election night the Chairperson gave an estimated turnout figure (48%), and then referred to a lower figure in a tweet a few hours later. Calculation of turnout ultimately depends on whether those who voted are measured as a proportion of registered voters in the polling stations that opened, or of all registered voters in the country. In the EU EOM sample, there was a turnout of 38.23% of all registered voters.⁶² The IEBC announced the final turnout as 42.36% of voters in the parts of the country where voting took place, and 38.84% of all registered voters. This is a sharp reduction from the 77.48% turnout in the August elections. President Kenyatta was declared elected with 98.27% of the votes.

During the results process, there were increased incidents of crowd disturbances and violence. The confrontation between protestors and security forces in Western Kenya intensified with two persons reportedly shot by the police on 27 October in Kisumu. Amnesty International Kenya reported gathering evidence of "*police shooting, aggressively assaulting, and even breaking into the homes of people suspected to be protesters; but also those who happen to be in the vicinity of protests*", alleging a "*deliberate campaign to punish inhabitants for continuing to protest*."⁶³ Also on 27 October, during a confrontation with the police, a man appears to have been shot dead in Muteremuko, Bungoma county. In Kawangware (Nairobi) there have been repeated incidents of gunfire, burned shops and running battles between protestors and security forces, resulting in at least one reported death. In Vihiga, one person was reported shot and at least 11 others injured.

⁵⁷ For example polling stations: 007027013202001 and 007027013403302 (Garissa Township).

⁵⁸ For example, in polling station 007027013100402 the number of valid votes on the form 34A was 96, while the form 34B indicated 496 (Garissa Township).

⁵⁹ Randomly selected from the entire country.

⁶⁰ For example in Narok North the votes on the 34A for the minor candidate (seemingly recorded by mistake) were then awarded to President Kenyatta, despite the finality of polling station results (polling station 033179089100402, Narok North).

⁶¹ This is consistent with the court directions given in the *Maina Kiai* case in which the court established that the results declared at polling stations and constituency tallying centres are final and the IEBC cannot alter them. Civil Appeal 105 of 2017, IEBC vs Maina Kiai and five others.

⁶² Controlling for missing data in the not fully readable 34A forms, which were included in the random sample.

⁶³ See for example, Amnesty International [Kenya: Violence, Killings and Intimidation Amid Elections](#), 30 October 2017.

EU EOM observers have seen evidence of ethnic profiling of Luos in Nairobi and Kikuyu in Bungoma (with houses and businesses marked with large red crosses). After the results declaration on 30 October, NASA supporters referred to not recognizing President Kenyatta.

7. The media

The media displayed commitment to diverse coverage and the election process despite limited capacity and security challenges

The presidential election has dominated the media since the 8 August polls, with constant coverage of the statements and activities of the two major political camps, the IEBC and other players. The media has covered NASA protests and police responses more actively than in the period following the 8 August election,⁶⁴ despite security challenges. One journalist was beaten and some others from major media houses were tear-gassed, threatened and prevented by the police from covering the NASA protests in Kisumu on 9 October. Over the election day period several journalists were prevented by security forces from covering electoral activities and protests, and others were threatened by agitated party supporters.⁶⁵

EU EOM media monitoring found that in comparison with the period prior to the 8 August election, NASA received larger shares of coverage overall, although this was in part negative in tone.⁶⁶ State broadcaster KBC aligned itself with Jubilee's views in its news programmes. In contrast to national broadcast media, vernacular radio stations more openly favoured one or another camp. Kameme and Kass promoted Jubilee's views and urged high voter participation on election day. Kameme also portrayed NASA in a very negative light. Mulembe and Musyi were leaning to NASA, and Ramogi allocated the majority of its news coverage to NASA.

Paid spots promoting the success of the President and the Jubilee government that were aired extensively prior to 8 August were banned by the High Court on 19 October and did not appear in the period preceding the 26 October election day.⁶⁷ Jubilee adverts appeared only in the last week of the campaign. NASA did not undertake any paid campaign in the media. IEBC voter education spots only appeared in the last week.

Based on the lessons learned in the 8 August elections, media representatives demonstrated commitment to providing live autonomous reporting of tallying (rather than relying primarily on the IEBC-provided figures, as they had in August).⁶⁸ Major media collected election results from constituency or county tallying centres, organized their own teams to tabulate results and provided prompt independent information to the public. Some journalists interviewed by EU EOM LTOs noted capacity constraints and a lack of training on the results process.

⁶⁴ This is in line with the EU EOM recommendations from 14 September.

⁶⁵ Journalists from Standard and NTV reported being prevented from covering election and post-election developments and their recordings being confiscated by security forces in Migori. One freelance journalist referred to a similar treatment by the security forces on election day in Lamu. Several journalists from KTN and Capital FM were attacked and harassed by party supporters in Nairobi.

⁶⁶ From 28 September until the end of the campaign period, the EU EOM analysed election-related coverage in 15 media outlets, consisting of 4 TV channels (KBC, Citizen, NTV and KTN), 7 radio stations (KBC Radio Swahili service, Radio Jambo, Kameme, Kass, Mulembe, Musyi and Ramogi), 3 daily newspapers (Nation, Standard and Star) and the weekly East African. Broadcasts were in Kiswahili, English, Kalenjin, Kamba, Kikuyu, Luhya, and Luo.

⁶⁷ The High Court issued a permanent injunction restraining the national government from advertising claims of its achievements from the past four years in the media.

⁶⁸ This is in line with the EU EOM recommendations from 14 September.

Fake news and documents continued to proliferate: for example a fake opinion poll during the campaign and a fake preliminary statement on the election by the International Republican Institute.⁶⁹ The spreading of rumours and fake news further eroded trust and created uncertainty in an already deeply polarized environment. It is not to be excluded that people take action on the basis of entirely false information. This highlights the need for responsible fact-based reporting, thorough training of journalists, improved public awareness, and the need for media to work independently.

8. Civil society

Lack of protection for civil society organisations and fear of reprisals

Immediately after the declaration of the 8 August presidential results, the NGOs Co-ordination Board undertook actions against the Kenya Human Rights Commission (KHRC) and the African Centre for Open Governance (AfriCOG). Both organisations have been critical of the government and the electoral process.⁷⁰ On 5 October, a letter by the Executive Director of the NGOs Co-ordination Board was circulated on social media announcing the suspension of activities of the International Development Law Organisation (IDLO), which provides support services to the judiciary. The authenticity of the letter is not entirely evident, and the NGOs Co-ordination Board's lack of clarification leaves the status of the letter unclear. Nevertheless, it is seen as intimidating to the IDLO and others. Various actors have expressed concern about additional possible reprisals against civil society organisations after the election.

Watchdog organisations were subject to strong criticism by the police for their documentation of killings during the disturbances after the August election. Multiple references have been made to anticipated attempts at political reprisals. For example, the Kenya National Commission on Human Rights (KNCHR), a constitutionally independent institution that works closely with CSOs, reports a recent budget cut decided by the executive of more than 25%.

Following the annulment of the presidential election, and its welcome by some CSOs, references started to appear to “*evil society*” (playing on “*civil society*”) bearing responsibility for a “*judicial coup*”. This included aggressive social media profiling, with personal contact information revealed.⁷¹

A diverse group of prominent Kenyans from across civil society, the private sector, religious groups and various professional associations have repeatedly called for reconciliation and political dialogue. Civil society has also been active in observing the election. Kura Yangu Sauti Yangu reported deployment of some 2,000 observers in 44 of Kenya's 47 counties. The Elections Observation Group (ELOG) reported 1,773 observers, albeit only in 215 constituencies and not 290 as before, for security reasons, with personal threats also made against some of its leadership. The KNCHR report having a total of 339 monitors across all constituencies.

⁶⁹ A [fake opinion poll](#) was published on a website imitating the Ipsos polling agency and distributed in its name, attempting to present the race between the two presidential front-runners as extremely close.

⁷⁰ In a letter published on social media on 14 August, the NGOs Co-ordination Board declared it would immediately de-register KHRC for its failure to pay taxes and properly disclose annual returns, among other alleged offences. On 15 August, the NGOs Co-ordination Board wrote a letter to the Director of Criminal Investigations instructing him to shut down AfriCOG and arrest its directors and members for failure to register as an NGO. On 16 August, there was an attempted raid on the AfriCOG offices by the Kenya Revenue Authority.

⁷¹ For example, a chart was circulated on social media entitled “*Judicial Coup – Presidential Petition 2017*” containing the names, photos and personal contact details (e.g. telephone numbers) of over 30 representatives of the judiciary, civil society, international organisations and media.

Recommendations for the remaining parts of the process

At this preliminary stage, the EOM has identified the following key recommendations for the remaining part of the election, which will be further developed and supplemented in the EU EOM final report:

1. Grievances over the electoral processes be addressed through judicial channels for legally-mandated remedy.
2. The courts and the IEBC be given full opportunity to work independently and without undue pressure.
3. Security agencies be fully accountable, including by providing public information on forces deployed and actions taken, as well as by independent investigation into their actions, with information made public on subsequent measures taken. Demonstrations should be peaceful.
4. Political leaders urgently engage in dialogue to identify ways forward, including addressing longer-term electoral reform issues to prevent problems evident in this election occurring again to the detriment of the nation.
5. The IEBC promptly publish information on the number of voters in each polling station who were identified biometrically, alphanumerically and by the manual complementary mechanism, to enable full public scrutiny. Also for the IEBC information on variances between polling station and constituency tallying results.

This Preliminary Statement is available on the mission website (Website: www.eueom.eu/kenya2017) and social media links: Facebook: www.facebook.com/eueomkenya2017, Twitter: [@eueomkenya2017](https://twitter.com/eueomkenya2017), Instagram: <https://www.instagram.com/eueomkenya/?hl=en>).

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